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I.

INTRODUCTION

Respondent concedes, as it must, that ordinarily the Supremacy Clause bars "any defensive assertion of sovereign immunity" by a State as "an affirmative defense to a federal cause of action under which it would be liable but for the defense." (Br. 21) *see Howlett v. Rose*, 496 U.S. ___, 110 S. Ct. 2430 (1990). Notably, Respondent does not disagree with the proposition that, read in the light of usual rules of statutory construction, the FELA plainly applies in this case. Respondent does not deny that the South Carolina Public Railways Commission *is* engaging in the business of operating a common-carrier railroad in interstate commerce. Instead, Respondent asks this Court to recognize "a Constitutional principle" (Br. 21) that would require this Court to reject long standing precedent and to read into the word "every" an implicit exception for state-owned railroads because Congress did not couple "every" with the phrase "including state-owned . . . "

Why require such redundancy as a matter of "Constitutional principle?" Respondent invokes *Welch v. Texas Dept. of Highways and Public Trans.*, 483 U.S. 468 (1987), in which this Court held that such elaborately explicit language is necessary before Congress can grant federal district courts jurisdiction to hear FELA claims brought against state government agencies. But *Welch* is an Eleventh Amendment case, and as Respondent and the court below acknowledge, the Eleventh Amendment is inapplicable in suits seeking to enforce federal claims in state courts. Indeed, a close reading of *Welch* itself suggests that a majority of this Court there assumed that FELA

state court jurisdiction survived, in order not to leave injured employees entirely remediless. Why apply Eleventh Amendment jurisprudence here, in a case falling outside the scope of the Eleventh Amendment? Respondent points to *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). In *Will* this Court held that a damages action brought in state court against a state agency, invoking 42 U.S.C. §1983, in fact fell outside the scope of §1983. But *Will* involved the interpretation of the term "person" which, within the larger language of §1983, did not readily encompass a "State." Here there is no such linguistic difficulty.

Obviously, Respondent is not interested in either the actual language of the FELA, the Eleventh Amendment or that of §1983. The key, it thinks, is the idea of state sovereign immunity, a notion Respondent sees as a sort of "brooding omnipresence," escaping all usual boundaries, fundamentally shaping both statutory interpretation and constitutional law. Petitioner does not doubt that respect for state sovereign immunity plays an important role in federal law, indeed sometimes a central role. But this idea, like all others in constitutional law, has its limits. It ought not be pushed to the point of paradox. And that is what Respondent would have this Court do. States *themselves* do not treat sovereign immunity as an absolute principle. Indeed, as Petitioner noted in his brief, South Carolina, since the incident at issue here, has repudiated its prior doctrines of sovereign immunity, opening state courts to suits much like the one in this case. Respondent, however, would add to the rules of statutory construction applicable in construing federal statutes an obligation, seemingly as a matter of constitutional compulsion,

requiring courts interpreting such statutes to, in all cases, treat state sovereign immunity as absolute, absent extraordinary congressional drafting, without regard to how particular states, within their own law, or as a matter of their own administrative practice, approach sovereign immunity questions.

Respondent has no choice, if it is to prevail in this case, but to assert such an extreme proposition. As Petitioner's brief has already indicated, a common sense approach to state sovereign immunity in FELA suits dictates reversal of the decision below.*

II.

RESPONDENT'S CONSENT

Respondent and its supporting *Amici* refuse to address the irrefutable record that establishes the voluntary entry of the Respondent into a regulated field when definitive and explicit interpretations of the federal law *previously* had established the applicability of federal law to any such rail operations conducted by a state. Not only were the explicit decisions of this Court [*U.S. v. California*,

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*We shan't pursue the "conflict" issues; there is no need. Respondent has not cited, much less addressed most of the precedents it seeks to overturn. Totally ignored are this Court's opinions in *U.S. v. California*, 297 U.S. 75 (1936); *California v. Taylor*, 359 U.S. 275 (1959); *Petty v. Tennessee-Missouri Bridge Commission*, 353 U.S. 553 (1957) and, also totally ignored is the majority position in *Welch*, 483 U.S. 468 (1987) (five members of the Court affirmatively validated the application of the Jones Act/FELA to state operations; one member of the Court disagreed, while three other members stated no position).

297 U.S. 75 (1936); *California v. Taylor*, 353 U.S. 553 (1957); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959); and *Parden v. Terminal Railway*, 377 U.S. 184 (1964)] already on the books when the Respondent state agency entered into rail commerce in 1969, the specific operation of the port railroad in Charleston, South Carolina had been adjudicated by a federal court as falling within the coverage of the FELA. In *Mathewes v. Port Utilities Commission of Charleston, S.C.*, 32 Fed.2d 913 (E.D.S.C. 1929) the district court addressed a common law demurrer premised "on the ground that the action is in tort and that, being municipal corporations, they are not liable for the torts of their agents." (*Id.* at 914). That court noted:

> The question here presented is whether Congress has the power to make a municipality of a state liable for the torts of its agents when it is engaged in interstate commerce; and if it has that power, whether it has done so by the Federal Employers' Liability Act.

The court considered the argument of the railroad that the FELA "although using general terms, should not be construed to include municipalities"; in rejecting that argument, based upon the plain language of the statute, the court concluded, in unassailable logic, that:

> "[e]very reason which could be urged upon Congress for the passage of this act in reference to railroads operated by private capital can be urged with equal force as to railroads operated by municipalities. Congress intended to and did occupy the whole field, and all state laws upon this subject, insofar as they cover the same field, or superseded." *Id.* at 915.

Other courts reached the same conclusion in advance of this Court's opinion in *Parden: Higginbotham v. Public*

Belt Railroad Commission, 188 So. 395 (La. 1939) (rejecting the contention that the FELA had no application to the rail operation "because it is, in fact, being operated by the state itself," 188 So. at 403); *Maurice v. State*, 110 Pac.2d 706 (Cal. App. 1941) (noting that the Safety Appliance Act applied to state railroads and that:

> "[i]t would be a strange situation, indeed, if the state could be held subject to the [Safety Appliance Act] and liable for a violation thereof, and yet could not be sued without its express consent. The state, by engaging in interstate commerce, and thereby subjecting itself to the act, must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent."
>
> 110 Pac.2d at 711

Respondent postulates a sweeping "straight forward rule." (Br. 3). The following "rule" will determine the precise issue* presented here:

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*Such a rule would satisfy the concern that enables "the states to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) [*Pennhurst I*]. Likewise, such rule would accommodate the "clear and manifest" notice of the application of the law. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The rule suggested would afford this Court the "perfect confidence" discussed in *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989). Explicitly, it satisfies the "clear notice" sought by Respondent (Br. 4) and its *Amici* (Br. 15-16). After all, when the highest court of the land has stated on four occasions that rail legislation *is* applicable to state operated railroads, and on two occasions has stated that the Jones Act/

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> Where a state voluntarily commences commercial activity that is pervasively regulated by federal law, and such federal law has been explicitly determined to be applicable to such state operations, that state has consented to be governed by the federal law.

Neither Respondent nor its supporting *Amici* cited, much less addressed *Port Authority Trans-Hudson Corp. v. Feeney*, [PATH] ___ U.S. ___, 1105 S. Ct. 1868 (1990);

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FELA, specifically, applies to states, how much more clarity can one expect? South Carolina's awareness of the consequences of its venture is repeated in its statutory enactments (Pet. Br. 7-8). Further recognition of South Carolina's knowing submission to the federal railroad scheme of things is found in its direction that the Respondent comply with the Railway Labor Act (354-3 – 210, S.C. Code).

It cannot be material whether the source of that awareness stems from the language of 45 U.S.C. § 51 itself ("every common carrier") or the interpretation of that language by this Court (*e.g. Petty; Parden; cf., Urie v. Thompson*, 337 U.S. 163, 181-182 (1949), "to read into this all inclusive wording, a restriction . . . would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established liberal construction of the Act followed by this Court.") – the fact is that South Carolina embarked into interstate rail commerce with the benefit of both sources of "notice." When all the statutory acknowledgments of federal authority are placed in focus, this Court can find *express consent*. See, *PATH, Petty*.

accordingly, the assumption here is that Respondent does not dispute our assessment (Br. 8-11) of that decision.*

Indeed, if consent to jurisdiction can subject a state agency to damages in the federal courts (as *PATH* holds) it would seem axiomatic that the supremacy clause, as interpreted (*e.g., Testa v. Katt*, 330 U.S. 386 (1947) and *Howlett v. Rose*, ___ U.S. ___ 110 S. Ct. 2430 (1990)) precludes states from shielding themselves in their own courts from damages under the same law.

Respondent has actually tripped over its own feet in its dance around the effect of its conduct. It *concedes* that "[w]aiver or consent might be effective to forego a defense to an otherwise applicable federal enactment" (Br. 21) but undoubtedly forgot that this is the *only* rational interpretation of the recent ruling in *PATH*!

III.

THE ELEVENTH AMENDMENT

Even if explicit supremacy principles somehow be sacrificed in favor of a theory of unstated "Constitutional" immunities, South Carolina's train was left at the station. Respondent blithely asserts that the "plan of the

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*We continue to find it inexplicable that this Court could unanimously decide *PATH* without meaning to say that states were subject to the Jones Act/FELA. To ignore the implicit effect of *PATH* is to ignore this Court's policy where mootness is suspected. Because of the "case or controversy" requirement under Article III of the Constitution, this Court will not consider (even by stipulation) moot cases, and, if in doubt, will remand to a lower court for consideration of the mootness issue. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 398, 402 fn. 12 (1975).

convention" concept has never commanded a majority in this Court. (Br. 19). In addition to dismissing *Monaco v. Mississippi*, 292 U.S. 313 (1934) and in arrogating to itself the determination as to how much of the "reasoning" in the plurality opinion was adopted by Justice White in his concurrence in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Respondent concededly did not have the prescience to anticipate this Court's opinion in *Blatchford v. Native Village of Noatak* (No. 89-1782, June 24, 1991; 1991 WL 107382 U.S.). We read it to reaffirm the "plan of the convention" doctrine. Respondent brushes off its consent by its voluntary entry into the pervasively regulated rail field by dogmatically asserting that *Welch* precludes any such result. (Br. 20)* Not only does this ignore *U.S. v. California, California v. Taylor, UTU* and *Petty*, it is a misreading of *Welch* as well! The "dissenting" opinion in *Welch* became the majority opinion on the remedial issue.**

**But see* Respondent's concession that *Welch* "specifically declined" to address the issue (Br. 7, fn. 13).

***Indeed, it is not difficult to understand that this Court will require more evidence of intent to abolish the explicit jurisdictional immunity the Eleventh Amendment establishes, but will look to the ordinary rules of construction, in light of the precedents of the Court, in addressing some less-than-explicitly-stated theory of immunity from the reach of the commerce power of the federal government. This is the basis for the assertion in our original brief (at 17-18) suggesting that less stringent scrutiny should be required when determining "whether a remedy is afforded by a federal law than the degree of scrutiny utilized in determining where" that remedy may be

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Accordingly, the concerns enunciated in some of this Court's Eleventh Amendment cases, looking for "clear notice" and seeking to avoid "retroactive" determinations that affect state operations, are simply not matters of concern in this instance. South Carolina had clear notice of the law of the land.

The statutes and practical operations of the rail system of South Carolina are completely congruent with the fundamental federal policy Chief Justice Burger described in *United Transportation Union v. Long Island RR Co.*, 455 U.S. 678 (1982):

> "[T]here is *no justification* for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. Railroads have been subject to comprehensive federal regulation for nearly a century." (emphasis supplied).
>
> 455 U.S. at 687.

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enforced. Strangely, Respondent seeks to avoid the effects of its own legislative mandates and voluntary conduct engaging in interstate rail commerce on the basis of an immunity *not* contained in the Constitution, while this Court has specifically recognized that the mandatory language of the Constitution can be bypassed with the "consent" of a State! Surely, if the filing of a paper in a federal court constitutes "consent" to an explicitly barred exercise of jurisdiction (*Clark v. Barnard*, 108 U.S. 436 (1883)), then the operation of a railroad servicing a major port in this country (pursuant to legislative enactments directing a state to submit to federal laws) evidences a consent to be governed by both those federal laws and their definitive and explicit interpretation by this Court!

As that opinion further explained the basis for such policy:

> "To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulations of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.
>
> In addition, a state acquiring a railroad does so knowing that the railroad is subject to this long-standing and comprehensive scheme of federal regulation of its operations . . . "
>
> 455 U.S. at 689

THE *HANS* CASE – CONTINUED PRECEDENT?

THE *PARDEN* CASE – CONTINUED PRECEDENT?

Respondent devoted one sentence (Br. 20) in discussing the continued viability of *Hans v. Louisiana*, 134 U.S. 1 (1890). Our only additional comment on the matter of *stare decisis* is by reference to language of two opinions in *Payne v. Tennessee* (No. 90-5721, June 27, 1991; 1991 WL 111161 U.S.). The "unworkable standard" enunciated by Justice Souter (concurring) seems to fit *Hans* very well. As for *Parden*, in the *Payne* opinion, Chief Justice Rehnquist emphasized situations in Constitutional cases where "correction through legislative action is practically impossible." Here we deal with a situation, however, that could have easily undergone "correction through legislative

action" if Congress had *disagreed* with this Court's previous rulings concerning federal supremacy and applicability in rail legislation. The Chief Justice further noted that "reliance interests" need to be considered. Here, state legislatures, state workers compensation programs and the regulatory agencies, as well as the operators of state owned railroads, all have relied upon the definitive, pervasive and uniform patterns established under the decisions that Respondent would now overturn.

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed, and this matter remanded for trial in the state courts of South Carolina.

Respectfully submitted,*

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*We appreciatively acknowledge the valuable insights and advice of Patrick O. Gudridge, Associate Dean, University of Miami School of Law.